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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

ALEJANDRINO RIVERA-SANCHEZ,

Petitioner,

v.

WORKERS' COMPENSATION
APPEALS BOARD and FOSTER
FARMS,

Respondents.

F056372

(WCAB No. STK0188355)

OPINION

THE COURT*

ORIGINAL PROCEEDINGS; petition for writ of review from a decision of the Workers' Compensation Appeals Board. James C. Cuneo, Alfonso J. Moresi, and Frank M. Brass, Commissioners. Alvin R. Webber, Workers' Compensation Administrative Law Judge.

Esequiel Solorio for Petitioner.

No appearance by Respondent Workers' Compensation Appeals Board.

Law Office of Joseph J. Barlupo and Joseph J. Barlupo, for Respondent Foster Farms.

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*Before Ardaiz, P.J., Gomes, J., and Dawson, J.

Alejandro Rivera-Sanchez petitions this court for a writ of review (Lab. Code,¹ §§ 5950, 5952; Cal. Rules of Court, rule 8.494) contending a decision of the Workers' Compensation Appeals Board (WCAB) reducing his permanent disability award from 38 percent to 28 percent following reconsideration lacks substantial evidence. We will deny the petition.

BACKGROUND

While working as a forklift operator for Foster Farms, Rivera-Sanchez sustained an admitted industrial injury to his upper back on November 25, 2003, when two forklifts collided. Rivera-Sanchez received medical care from his primary treating physician, Jackie T. Chan, M.D., who concluded in a May 10, 2004, report that Rivera-Sanchez's subjective complaints were "out of proportion" to what he observed objectively from his physical examination, but nevertheless opined Rivera-Sanchez's "current symptoms and objective findings support a disability that would preclude [him] from very heavy lifting" and a loss of "approximately 25% of his pre-injury" lifting capacity. In a June 29, 2004, supplemental report, Dr. Chan repeated that Rivera-Sanchez's subjective complaints were disproportionate to the objective findings, but rated those complaints "closer to constant slight pain."

Rivera-Sanchez also obtained a qualified medical evaluation (QME) from orthopedist Andrew K. Burt, M.D. Dr. Burt similarly did not detect any objective factors of disability in Rivera-Sanchez, but described "pain of slight to moderate intensity at the back" that worsened when bending, lifting, pushing, and pulling.

After a hearing in February 2006, workers' compensation administrative law judge (WCJ) Bertram Cohen concluded in June 2006 that after adjusting for Rivera-Sanchez's age and occupation, the industrial injury caused permanent partial disability of 28

¹ Further statutory references are to the Labor Code unless otherwise stated.

percent, amounting to \$21,043.75 over 113.75 weeks. The WCJ found Dr. Burt's medical opinion the "most well-reasoned and persuasive," and explained that while Rivera-Sanchez's subjective complaints might have led to a higher rating up to the life pension range,² "Dr. Chan admits that the subjectives are far out of proportion." WCJ Cohen thus concluded Dr. Burt's subjective factors of disability and work limitations were in accordance with "the true measure of Applicant's disability."

Foster Farms petitioned the WCAB for reconsideration, contending the WCJ's decision was not based on substantial evidence in part because Dr. Burt had not reviewed x-rays of Rivera-Sanchez taken on December 4, 2003. On August 3, 2006, WCJ Cohen vacated the findings and ordered the parties to instruct Dr. Chan to take additional x-rays and to forward his reports to Dr. Burt for review.

At an April 4, 2007, deposition, Dr. Burt acknowledged Rivera-Sanchez probably sustained some level of pain given his history, but found Rivera-Sanchez's complaints not credible and opined he had embellished his symptoms. As Dr. Burt described, "In other words, if they were totally credible, the guy would be in an intensive care unit somewhere. He's not, so...." Dr. Burt testified he would not change the factors of disability he had previously assigned in his previous reports.

By November 29, 2007, WCJ Cohen retired and the matter had been transferred to WCJ Alvin Webber, who issued a findings and award acknowledging review of Dr. Burt's deposition and reiterating WCJ Cohen's conclusion that Rivera-Sanchez was 28 percent permanently disabled based on Dr. Burt's medical opinion.

Foster Farms timely petitioned for reconsideration by again contending the findings were not based on substantial evidence. Foster Farms faulted the WCJ for not

² An employee is entitled to a life pension for permanent disabilities of at least 70 percent. (§ 4659.)

discussing the discrepancies between Dr. Burt's reports and his deposition testimony, and for failing to comment on Dr. Chan's opinion as the primary treating physician. On December 27, 2007, WCJ Webber issued an order vacating the findings and award, acknowledging that Foster Farms "'is entitled to know what the rating was based upon,'" and setting the matter on calendar to cross-examine the disability rater. At the time of trial, however, Foster Farms instead requested the WCJ request a formal rating from the Disability Evaluation Unit (DEU) based on Dr. Burt's report, reserving the right to cross-examine the rater at a later date. On March 3, 2008, the DEU rater returned a recommendation that Rivera-Sanchez was 38 percent permanently disabled based on the WCJ's rating instructions. On March 19, 2008, WCJ Webber adopted the disability rater's figures and awarded Rivera-Sanchez 38 percent permanent disability, amounting to \$33,670 over 182 weeks.

A week before the WCJ's latest findings and award, however, Foster Farms had moved to strike the DEU's recommended rating. Apparently having just discovered the filing, the WCJ rescinded the March 19, 2008, findings and again set the matter on calendar to cross-examine the rater.

On June 30, 2008, after the DEU rater explained his methodology at a May 2008 hearing, the WCJ reissued his prior findings, award, and opinion concluding Rivera-Sanchez sustained 38 percent permanent disability as a result of the industrial injury. Foster Farms again petitioned the WCAB for reconsideration, which the WCAB granted. In a September 17, 2008, decision, the WCAB explained that Dr. Chan's medical opinion rated Rivera-Sanchez as low as 12 percent based on his work preclusions or as high as 70 percent or above considering his "'out of proportion'" subjective complaints, while Dr. Burt's opinion rated between 33 and 38 percent. The WCAB explained that "in light of the entire record, including the severity of the mechanism of injury and applicant's low

pain threshold or exaggerated complaints, we conclude, based on the range of evidence, that the injury caused 28% permanent disability.”

DISCUSSION

Appellate review of a workers’ compensation decision is limited to whether the WCAB acted without or in excess of its powers or whether the order, decision, or award was unreasonable, not supported by substantial evidence, or procured by fraud. (§ 5952, subds. (a)-(d).) We also consider whether the WCAB’s findings of fact support the order, decision, or award. (§ 5952, subd. (e).) We may not conduct a trial de novo, admit evidence, or exercise our independent judgment on the evidence. (§ 5952.) We therefore may not reweigh evidence or decide disputed questions of fact, and instead “must determine whether the evidence, when viewed in light of the entire record, supports the award of the WCAB.” (*Keulen v. Workers’ Comp. Appeals Bd.* (1998) 66 Cal.App.4th 1089, 1095-1096.)

In petitioning this court for review, Rivera-Sanchez contends the WCAB “failed to explain why it did not consider or include the subjective factors of disability as noted in Dr. Burt’s November 12, 2004, report to reaffirm the 38% level of disability awarded by the trial judge.” Rivera-Sanchez contends the WCAB never stated it disbelieved Dr. Burt’s assessment of applicant’s subjective factors of disability and wonders why his lack of credibility somehow tainted Dr. Burt’s opinion. He also contends the WCAB’s labeling of his 28 percent permanent disability rating within “the range of evidence” fails to explain how it achieved that result.

In referring to the “range of evidence” theory in its opinion, the WCAB relied on *U.S. Auto Stores v. Workmen’s Comp. App. Bd.* (1971), 4 Cal.3d 469, in which our Supreme Court held that a WCAB “decision is supported by substantial evidence if the degree of disability found by the referee is within the *range* of evidence in the record. It

is not necessary that there be evidence of the exact degree of disability.” (*Id* at pp. 474-475.)

In advocating this court vacate the WCAB’s findings and instead require the adoption of Dr. Burt’s medical opinion, Rivera-Sanchez fails to explain why Dr. Chan’s opinion does not support a rating within the range including 28 percent permanent disability. In reviewing a decision, “it is well established that the relevant and considered opinion of one physician may constitute substantial evidence in support of a factual determination of the WCAB.” (*Braewood Convalescent Hospital v. Workers’ Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 169, citing *LaVesque v. Workmen’s Comp. App. Bd.* (1970) 1 Cal.3d 627, 639.) Even a medical opinion inconsistent with other opinions may constitute substantial evidence. (*Place v. Workmen’s Comp. App. Bd.* (1970) 3 Cal.3d 372, 378.)

Here, the WCAB awarded Rivera-Sanchez a lower permanent disability rating within the range of medical evidence because both Dr. Chan and Dr. Burt reported that Rivera-Sanchez had an unusually low pain threshold or had exaggerated his symptoms, either of which effectively imposed doubt as to accuracy of their medical diagnoses. Accordingly, the WCAB concluded, based on the severity of the forklift injury and Rivera-Sanchez’s out-of-proportion subjective complaints, that 28 percent was a reasonable level of permanent disability within the range of permanent disability ratings described by Dr. Chan. Even Rivera-Sanchez argues to this court that Dr. Chan’s medical reporting, as revised in his June 29, 2004, report, could have led to a standard rating as low as 10 percent.³ Although Rivera-Sanchez would likely prefer a 38 percent

³ Moreover, we note that although Rivera-Sanchez now concludes the medical evidence fails to support a 28 percent permanent disability award, he did not petition the WCAB for reconsideration from either of the first two 28 percent permanent disability awards.

permanent disability rating, he does not present a legal basis for this court to vacate the WCAB's finding of fact.

DISPOSITION

The petition for writ of review is denied. This opinion is final forthwith as to this court.